In the Matter of

DAVID HINTON
Claimant

v.

CERES MARINE TERMINAL
Employer

and

CERES GULF, INC.
Carrier

DATE ISSUED: January 11, 1999

CASE NO.: 1998-LHC-01136

OWCP NO.: 08-104533

Appearances:

Lewis S. Fleishman, Esquire (Richard Schecter, P.C.) Houston, Texas for the Claimant

Lawrence P. Postol, Esquire (Seyfarth, Shaw, Fairweather & Geraldson) Washington, D.C. for the Employer and Carrier

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER DENYING MODIFICATION

I. Statement of the Case

This proceeding arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq*. (The "Act") and is currently before me on the Employer's motion pursuant to section 22 of the Act for modification of a decision and order - awarding benefits which I issued on December 17, 1998. In that decision, I found that the Claimant had established that his disability resulting from a December 3, 1992 work-related injury prevents him from returning to his regular employment as a longshoreman and that the Employer had not met its burden of demonstrating the availability of suitable alternative employment. Decision and Order at 10-12. As pertinent to the modification request, the Employer had introduced a labor market survey identifying several entry-level positions which appeared compatible with the Claimant's physical limitations, I found that the survey did not address whether these positions are

available to a person who, like the Claimant, is illiterate and unable to perform basic mathematics and who has spent his entire working life in heavy manual jobs. *Id.* at 11. I further found that the Claimant's disability had become permanent, and I ordered the Employer to pay the Claimant permanent total disability benefits, interest on unpaid benefits and medical expenses pursuant to section 7 of the Act. *Id.* at 12, 14.[1]

On January 5, 1999, the Employer filed a timely motion for reconsideration of the decision and order - awarding benefits.[2] In its motion, the Employer requested that I modify the decision to reflect a stipulation reached by the parties as to the Claimant's residual earning capacity. In this regard, the Employer asserted that it was agreed at the hearing that the Employer would not call its vocational expert to testify and that the labor market survey would be admitted, with the exception of one position which was withdrawn by the parties' stipulation, for me to consider in determining the Claimant's residual earning capacity. The Employer further stated that its understanding of this agreement was that the remaining jobs in the survey were not objected to as unsuitable by the Claimant so that it was unnecessary to call the vocational expert to testify regarding the jobs listed in the survey, their physical demands or the Claimant's mental ability to perform them. Based on these assertions, the Employer moved that I modify the decision to reflect a full-time residual wage-earning capacity of $4.25 to $6.50 per hour.[3] In the alternative, the Employer moved that I reopen the record so that testimony and evidence might be taken as to why the stipulation should be disregarded. In response, the Claimant urged that the Employer's motion be denied on the ground that the record of the hearing did not support the Employer's contention that the parties entered into a stipulation which required me to find that the Claimant has a post-injury full-time wage-earning capacity based on the positions listed in the Employer's labor market survey.

I convened a conference call with counsel for both parties on January 8, 1999 in an effort to clarify their respective positions. During this conference, counsel to the Claimant reiterated that the Claimant did not agree with the Employer's position that the intent of the parties' stipulation was to require a finding that the Claimant has a residual wage-earning capacity, as reflected by the jobs cited in the labor market survey, in the event that I determined that the Claimant is totally disabled from his usual longshore employment. Counsel to the Employer then proposed that, if I declined to modify the decision and order to reflect the Employer's version of the parties' stipulation, the record be reopened to allow for the submission of deposition testimony from its vocational expert. The Claimant did not oppose this alternative request.

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[1] I also allowed the Claimant's attorney leave to submit an application for fees which I awarded in a supplemental decision and order issued on April 26, 1999.

[2] The Employer also filed an appeal with the Benefits Review Board. On March 25, 1999, the Board dismissed the Employer's appeal and remanded the case to the Office of Administrative Law Judges for modification proceedings.

[3] The jobs cited in the Employer's labor market survey reportedly paid these wages.

By order issued on January 11, 1999, I denied the Employer's motion for reconsideration based on my finding that the record does not support the Employer's contention that the parties stipulated that the labor market survey establishes that the Claimant has a residual earning capacity of $4.25 to $6.50 per hour. Rather, I found that the parties' stipulation, as reflected in the hearing transcript, was to withdraw one of the jobs listed in the labor market survey and to allow the remainder of the jobs to be placed before me for *consideration* as to whether or not these positions would equate to the Claimant's residual earning capacity. However, in light of the particular circumstances where it appeared that testimony relevant to the issue of suitable alternative employment was not offered at the hearing based on a *bona fide* misunderstanding regarding the nature of the parties' stipulation, I further found that the interests of justice required that the Employer's unopposed request to reopen the record be granted. Accordingly, I treated the Employer's request to reopen the record as a motion for modification under section 22 of the Act, and I reopened the record for the limited purpose of allowing the Employer to offer the deposition testimony of its vocational expert and for the Claimant to offer any appropriate rebuttal evidence. Specifically, the Employer was allowed until February 10, 1999 to offer the deposition transcript, the Claimant was allowed until March 12, 1999 to offer any rebuttal evidence, and the parties were allowed until March 31, 1999 to submit written argument.

Following issuance of the January 11, 1999 order, new counsel entered an appearance on behalf of the Employer, and a telephone conference was held at the parties' request to discuss the scope of the modification proceeding and what additional evidentiary submissions would be permitted. At that time, I advised counsel to both parties that I had granted the Employer's request to reopen the record to allow the Employer to submit evidence, namely the testimony of its vocational expert, that it would have offered at the hearing but for the parties' aborted stipulation relating to the availability of suitable alternative employment. However, I added that it was not appropriate to allow a party to use a modification proceeding for the purpose of correcting errors in its litigation strategy by now offering newly-developed evidence such as additional vocational testing which could have been accomplished prior to the hearing but was not. I concluded the conference call by instructing the parties to proceed with the deposition of the Employer's vocational expert with this general guidance in mind, and I advised that I would reserve ruling on any specific objections to lines of questioning and to any additional documentary evidence until such time as the deposition transcript and any other additional evidence was offered.

On February 9, 1999, the Employer submitted the transcript of the deposition of its vocational expert which was taken on February 2, 1999. In the letter submitting the deposition transcript, the Employer also requested relief under section 8(f) of the Act.[4] Employer's

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[4] By letter dated February 2, 1999, counsel to the Employer advised that he had addressed the issue of section 8(f) relief at Ms. McQuade's deposition and that the Employer was, by serving a copy of this letter on Carol DeDeo, Esq. of the United States Department of Labor's Office of Solicitor, putting the Solicitor on notice that it was requesting section 8(f) relief. The

Modification Exhibit EMX 1.[5] On March 12, 1999, the Claimant filed a motion to submit reports from a vocational expert, William J. Kramberg, as rebuttal evidence. CMX 1.[6] On March 19, 1999, The Employer filed its brief in support of modification and an opposition to the Claimant's motion to admit Mr. Kramberg's vocational reports. The Claimant filed his brief in opposition to the Employer's modification request on March 31, 1999. By letter dated April 1, 1999, the Employer expanded on its opposition to the Claimant's motion to submit Mr. Kramberg's vocational reports by requesting leave, in the event the Claimant's motion is granted, to conduct vocational testing of the Claimant and to depose Mr. Kramberg. In addition, the Employer stated that, if Mr. Kramberg's reports were admitted, it wished to offer six documents allegedly written and/or signed by the Claimant as evidence that the Claimant is not illiterate, and it submitted two documents relating to the existence of a pre-existing disability in support of its request for section 8(f) relief.[7] In a letter dated April 14, 1999, the Employer suggested that I first rule on the request for section 8(f) relief as "no opposition has been made to that request, and the evidence is rather straightforward"[8] and because "resolution of that issue would probably assist the parties in resolving the other issues." On April 19, 1999, the Claimant filed a motion to strike seven of the eight documents submitted with the Employer's April 1, 1999 letter.[9] Finally, on April 20, 1999, the Employer offered four additional documents in the event the Claimant's motion to permit submission of Mr. Kramberg's vocational reports was granted.[10]

Employer's February 9, 1999 letter requesting section 8(f) relief was also served on Ms. DeDeo.

[5] Documentary evidence submitted in the modification proceeding will be referred to as "EMX" for exhibits offered by the Employer and "CMX" for exhibits offered by the Claimant. Evidence admitted at the hearing will continue to be referred to as "ALJX" for an exhibit offered by this Administrative Law Judge; "CX" for a Claimant's exhibit; "EX" for an Employer's exhibit. Any references to the official hearing transcript will be designated as "TR".

[6] The reports from vocational expert Kramberg were submitted "under seal", apparently in an attempt to prevent their disclosure to the Employer should I rule against their admission.

[7] The Employer designated the documentary evidence submitted with its April 1, 1999 letter as EX 17-24. These documents have been redesignated as EMX 2-9. EMX 2-7 are the documents allegedly written and/or signed by the Claimant, and EMX 8 and 9 are the two documents offered in support of the request for section 8(f) relief.

[8] The Director, Office of Workers' Compensation Programs has not raised any objection to the Employer's request for section 8(f) relief.

[9] The Claimant did not object to EMX 8, a letter dated January 25, 1991 from Antonio A. Moure, M.D. concerning the Claimant's medical treatment and condition.

[10] These additional documents, which were identified by the Employer as EX 25-29, have been redesignated as EMX 10-14.

The parties having been afforded an opportunity to submit evidence and argument pursuant to my January 11, 1999 order reopening the record for modification proceedings, the matter of the Employer's entitlement to modification is now ripe for adjudication. After careful consideration of the entire record including the arguments of the parties, I have concluded that modification is not warranted. My findings of fact and conclusions of law follow.

II. Summary of the Additional Evidence

The Employer took the testimony of vocational expert Lorie McQuade-Johnson at a deposition on February 2, 1999. EMX 1. At the deposition, the Employer introduced six exhibits which are appended to the deposition transcript and identified therein as Defendant's Exhibits 1-6, and the Claimant introduced five exhibits which are appended to the deposition transcript and identified therein as Claimant's Exhibits 1-5.[11] Ms. McQuade-Johnson testified that she has a master's degree in vocational rehabilitation counseling and that she is a certified vocational counselor who has worked for both the Department of Labor and Social Security Administration as well as private clients. *Id*. at 8-9. Ms. McQuade-Johnson further testified that she had reviewed the deposition testimony from the Claimant's treating physician, Dr. Gold (CX 6), and that two cashier positions listed in her April 30, 1993 labor market survey (EX 13)[12] were compatible with the Claimant's physical restrictions as identified by Dr. Gold. *Id*. at 10-11. She stated that she had contacted two employers of cashiers, Mr. Carwash and the Houston Food Mart, and confirmed that they would hire the Claimant even if he were totally illiterate. According to Ms. McQuade-Johnson, both of these cashier positions were available in June 1995 and continue to be available. *Id*. at 11-12, 55-56. Ms. McQuade-Johnson also stated that it is her opinion that an older person's life experience in managing their personal affairs including reading and paying bills and going to the store to purchase groceries demonstrated a capability to perform the basic mathematics necessary for these cashier positions. *Id*. at 80-81. Ms. McQuade-Johnson testified that the employers of the other cashier positions listed in her original survey were no longer in business, but it was her opinion that it was "most probable" that these employers too would have hired an illiterate person as a cashier were they still in business. *Id*. at 12-14. Prior to the deposition, Ms. McQuade prepared a supplemental labor market survey dated January 28, 1999, and she stated that she identified four employers in this survey who had cashier positions available in June 1995 and who would hire an illiterate person for these positions. *Id*. at 14-15.

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[11] Counsel to the Claimant objected to the introduction of Defendant's Exhibits 2 and 6 on grounds that they exceeded the scope of evidence as outlined in the conference call that I had held with the parties following issuance of the January 11, 1999 order. The Employer objected to all of the Claimant's deposition exhibits as irrelevant and to Claimant's Exhibits 2-5 on the additional ground that they were prepared by witnesses who were not available for cross-examination. These and other objections to the evidence offered in the modification proceeding will be addressed *infra*.

[12] This labor market survey was also introduced at Ms. McQuade-Johnson's deposition as Defendant's Exhibit 5.

Based on her labor market surveys, and considering the physical restrictions identified by Dr. Gold and the Claimant's illiteracy, Ms. McQuade-Johnson testified that it was her opinion that the Claimant had a residual earning capacity of "roughly $200.00 per week." *Id*. at 18. Finally, Ms. McQuade-Johnson testified that, but for the Claimant's pre-existing neck injury, there would be additional higher-paying jobs available to him. *Id*. at 15.

On cross-examination, Ms. McQuade-Johnson was questioned about the Claimant's past work history and the cashier positions that she identified as being available to an illiterate person with the Claimant's physical limitations. Regarding the Claimant's past work history, she testified that his work as a longshoreman was a very heavy, unskilled job which required no mathematical skills. EMX 1 at 35. She further testified that she considered his prior construction, railroad and farm work to be too remote in time to be relevant, but she agreed that none of these jobs required any literacy or mathematics at even a basic level. *Id.* at 36. She stated that the Claimant had no skills or abilities that could be transferred to work performed at the same or lesser skill level as his past work, and she stated that the Claimant had not been tested by her firm to determine his skill level. *Id.* at 37-38. Regarding the cashier position, Ms. McQuade-Johnson testified that it would "certainly be helpful" for the incumbent to be able to add and subtract, although she stated that the cash registers currently in use are very sophisticated so that cashiers don't need to add and subtract very much anymore. *Id.* at 52. She also stated that a majority of cashiers are no longer required to balance out the cash drawer at the end of a shift, as this is generally done by a supervising or head cashier. *Id.* at 53. Lastly, she stated that while she had contacted some prospective employers of cashiers about their willingness to hire an individual who is illiterate, she did not explore the mathematics skills required, nor did she discuss these employers' willingness to hire a person who is unable to add or subtract. *Id.* at 56-60.

At the deposition, the Employer introduced medical records which show that the Claimant was admitted by Dr. Gold to the Park Plaza Hospital in Houston on May 15, 1990 for evaluation and treatment of symptoms of vertigo, right leg pain and weakness and right arm, shoulder and neck pain with associated tension headaches, all reportedly related to a December 26, 1988 fall of 18 to 20 feet from two containers. Defendant's Deposition Exhibit 1 at 4.[13] Dr. Gold provided an impression of severe cervical disc disease and possible damage to the semi-circular canals in the Claimant's head. *Id.* at 5. An anterior discectomy was performed at C4-5 and C5-6 with removal of bony spurs and midline calcified bars at both levels and fusion at both levels by Antonio Moure, M.D. who rendered a post-operative diagnosis of cervical spondylosis with nerve root compression on the right side between C4-5 and C5-6. *Id.* at 2. The Claimant was discharged after this surgery but was readmitted on May 27, 1990 for treatment of intractable neck pain and modest azotemia. *Id.* at 7. A MRI study during this follow-up admission gave an

[13] The Employer has also offered a notice which was provided to the Office of Workers' Compensation Programs (OWCP) by the carrier to the Claimant's employer at the time of the December 26, 1988 injury, Fairway Terminal, which reflects that the Claimant was paid temporary total disability benefits from December 27, 1998 to March 13, 1991. EMX 9. As noted above, the Claimant has moved to strike this document.

impression of degenerative changes at C4-5, C5-6 and C6-7 as well as the recent interbody fusion. *Id.* at 8. In a letter dated January 25, 1991, Dr. Moure reported that he was discharging the Claimant from his care to return to "light duty" as he had reached maximum benefit from the cervical surgery and post-surgical physical therapy for cervical muscle spasms and right arm pain. EMX 8. Regarding any residual disability, Dr. Moure stated,

> As far as disability is concerned, as you recall, this patient had a lumbar laminectomy performed by me in 1978 at the level of L4-5 and at that time was advised to return to work consisting of no lifting over seventy pounds with restricted bending, stooping and climbing and a permanent partial disability of approximately 20 percent. The patient, because of the surgery to the cervical spine and the persistence of cervical spasms in the neck, has further disability now of approximately 30 percent resulting in a total disability of 50 percent. He is advised to do no lifting over 40 pounds and no climbing, stooping or bending.

Id. At the McQuade-Johnson deposition, the Employer also introduced responses which Dr. Gold provided to a January 20, 1999 letter. In response to the Employer's questions, Dr. Gold stated that he agreed that the Claimant's neck surgery and fusion rates at least a seven percent permanent disability rating under the American Medical Association's guidelines and that the Claimant should not work at a job such as truck or van driver or stock boy which requires a lot of overhead work, or twisting of the neck, even within the 10-15 pound lifting limit imposed after the Claimant sustained the December 3, 1992 chest injury. Defendant's Deposition Exhibit 2.[14]

For his part at the deposition, the Claimant introduced the following documentary evidence:

> (1) an excerpt from the Dictionary of Occupational Titles containing a description of the Stevedore II position (DOT No. 922.687-090); Claimant's Deposition Exhibit 1;
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> (2) forms completed by Ms. McQuade-Johnson and/or others in obtaining data for the April 30, 1993 labor market survey; Claimant's Deposition Exhibits 2 and 3;
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> (3) a copy of a letter dated September 17, 1996 from Ms. McQuade-Johnson to a Dr. Paul Vitenas, Jr. concerning a workers' compensation claim that is not related to the Claimant's case; Claimant's Deposition Exhibit 4; and
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> (4) a copy of a letter dated April 4, 1994 from a Dr. Glen C. Landon to counsel for the Claimant regarding a conversation Dr. Landon reportedly had with Ms.

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[14] As noted previously, the Claimant objected to admission of this letter on the ground that it exceeded the appropriate evidentiary scope of the modification proceeding.

McQuade Johnson concerning a workers' compensation claim that is not related to the Claimant's case. Claimant's Deposition Exhibit 5.[15]

In addition to the documents introduced at the McQuade-Johnson deposition, the parties have offered the following documents into evidence:

(1) rebuttal vocational rehabilitation reports of William J. Kramberg; CMX 1;

(2) documents allegedly written and/or signed by the Claimant; EMX 2-7;

(3) a letter dated January 25, 1991 from Antonio A. Moure, M.D. P.A. regarding the Claimant's medical history and condition prior to the work-related injury that is the subject of his current claim under the Act; EMX 8;

(4) notice provided to the Office of Workers' Compensation Programs (OWCP) by the carrier to the Claimant's employer at the time of his December 26, 1988 injury, Fairway Terminal, which reflects that the Claimant was paid temporary total disability benefits from December 27, 1988 to March 13, 1991; EMX 9;

(5) additional documents which the Employer alleges to have been written and/or signed by the Claimant; EMX 10-12;

(6) a letter dated April 13, 1978 regarding the Claimant's application for Social Security disability benefits for the period of January to October 1977 due to ruptured discs; EMX 13; and

(7) a letter dated January 5, 1982 regarding a prior compensation claim arising out of a June 18, 1980 work-related accident; EMX 14.

III. Rulings on the Scope of the Modification Proceeding and Admissibility of Evidence

Section 22 of the Act permits any party-in-interest to request modification of a compensation award within one year of the last payment of compensation or rejection of a claim on grounds that there has been a change in conditions or a mistake in a determination of fact. 33 U.S.C. §922. Here, the Employer does not argue that there has been any change in the Claimant's condition. Instead, it contends that there was a factual error in my finding that it had not established the existence of suitable alternative employment and in my consequent determination that the Claimant is totally and permanently disabled. In addition, it now seeks to

[15] The Employer objected to the admission of Claimant's Deposition Exhibits 2-5 on grounds of relevancy and hearsay. EMX 1 at 75.

utilize the reopening of the record for modification proceedings to request special fund relief pursuant to section 8(f) of the Act and to introduce evidence in support of this request.

Regarding modification proceedings to correct mistaken factual determinations, the Supreme Court has held that section 22 provides broad discretion to correct mistakes of fact, whether they are demonstrated by wholly new evidence, cumulative evidence, or merely by further reflection on the evidence initially submitted. *O'Keefe v. Aerojet-General Shipyards*, 404 U.S. 254, 255-56 (1971). Although section 22 has been broadly interpreted as a vehicle for ensuring that the interests of justice are served, it does not provide parties with an unlimited opportunity to reopen a prior award or denial whenever they find themselves dissatisfied with the outcome of prior litigation. Rather, the need to render justice must be balanced against the need for finality in decision-making. *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 25 (1st Cir. 1982). As the Court of Appeals for the District of Colombia Circuit cautioned in *McCord v. Cephas*, 532 F. 2d 1377, 1380-81, "an allegation of mistake should not be allowed to become a back door route to re-trying a case because one party thinks he can make a better showing on the second attempt . . . [t]he congressional purpose in passing the law would be thwarted by any lightly considered reopening at the behest of an employer who, right or wrong, could have presented his side of the case at the first hearing and who, if right, could have thereby saved all parties a considerable amount of expense and protracted litigation." *See also Lombardi v. Universal Maritime*, 32 BRBS 83, 86 (1998) (*Lombardi*); *Delay v. Jones Washington Stevedoring*, 31 BRBS 197, 204-205 (1998) (*Delay*). These latter two cases are particularly instructive in answering the question presented by the parties' evidentiary submissions and objections in connection with the Employer's modification request.

In *Lombardi*, Administrative Law Judge Ralph A. Romano determined that the claimant was unable to perform his usual job, and he awarded total disability benefits as the employer had presented no evidence of suitable alternative employment. The employer then moved for modification by offering a new medical report and vocational evidence relating to the availability of suitable alternative employment. Judge Romano denied modification, finding that the new medical evidence did not establish a change in conditions and that the employer could not show a change in conditions based on vocational evidence submitted for the first time on modification where it had specifically declined at the hearing to present vocational evidence in support of an alternative defense that the claimant was capable of engaging in suitable alternative employment. *Id*. at 84. On appeal, the Board affirmed Judge Romano's denial of modification, noting,

> It is well-established that Section 22 is not intended to be a back door for retrying or litigating an issue which could have been raised in the initial proceedings. Nor are parties "permitted to invoke §22 to correct errors or misjudgements of counsel, nor to present a new theory of the case . . . ." In the case at bar, employer has set forth no indication as to why, in preparation for the hearing, it did not develop vocational evidence in support of an alternative defense that claimant could perform suitable alternative employment, in the event he should be found unable to return to his usual work.

Id. at 86-87 (quotations in original; citations omitted). In *Delay*, the ALJ initially awarded the claimant total disability benefits. The employer thereafter moved for reconsideration and to reopen the record. The ALJ denied reconsideration but treated the employer's request as motion for modification. Accordingly, she reopened the record on the issues of maximum medical improvement and extent of disability. The ALJ further ordered the claimant to submit the results of a physical capacity evaluation (PCE) which had been administered prior to the hearing but which had not previously been disclosed to the Employer, and she precluded the parties from submitting evidence on modification which could have been introduced, with due diligence, at the prior hearing. After receiving the previously-undisclosed PCE, the employer offered additional evidence including a supplemental report and post-hearing labor market survey from its vocational expert who had testified at the hearing and who now addressed the claimant's employability based on the PCE and the employer's other new evidence. The ALJ then granted the claimant's motion to strike as untimely the labor market survey, which addressed jobs outside of the longshore industry. *Id.* at 198, 203 n. 13. Following an appeal by the employer who was joined by the Director, Office of Workers' Compensation Programs, the Board vacated the ALJ's exclusion of the employer's post-hearing labor market survey and remanded the case to her for further consideration. In this regard, the Board found no fault with the ALJ's reasoning that it was within her discretion to refuse to consider post-hearing evidence when the party offering the evidence failed to exercise due diligence in anticipating the issue prior to the hearing and especially when the moving party waited until after the issuance of an adverse decision. *Id.* at 203-204. However, it agreed with the employer and the Director that the ALJ had erred on the particular facts presented by refusing to consider the employer's vocational evidence of suitable alternative employment in the modification proceeding as such evidence was not previously available:

> In this case, however, the vocational evidence which employer sought to introduce was not, contrary to the administrative law judge's determination, available as of the date of the initial hearing. Rather, after reviewing the previously unavailable PCE, and Mr. Karnofski's and Dr. Peterson's post-hearing deposition testimony, Mr. Tomita [the employer's vocational expert] conducted labor market surveys in November 1995, February 1996 and May 1996, after the issuance of the administrative law judge's initial Decision and Order. On these facts, it was an abuse of discretion for the administrative law judge to fail to consider the evidence submitted during the modification proceeding.

Id. at 204-205. The Board further noted that the case presented extenuating circumstances, the claimant's failure to disclose the PCE during discovery, which excused the employer's failure to present the late-submitted evidence at the hearing as the employer was precluded by the claimant's non-disclosure from developing vocational evidence based on the PCE until after the hearing. Thus, the Board concluded that the employer was not attempting to raise a new issue post-hearing but rather was merely attempting to introduce new evidence which was not available at the time of the initial hearing and which may be submitted pursuant to a motion for modification. *Id.* at 205 n. 14.

The instant case falls somewhere between the situations presented in *Lombardi* and *Delay*. In my view, the parties' *bona fide* misunderstanding as to the meaning of the stipulation entered into at the hearing constitutes an extenuating circumstance which excuses the Employer's failure to produce the testimony of its vocational expert, Ms. McQuade-Johnson, at the hearing. Accordingly, I affirm the determination in my January 11, 1999 order that the interests of justice require that the Employer's unopposed request to reopen the record be treated as a motion for modification, and I remain of the opinion that the record was properly reopened for the limited purpose of allowing the Employer to offer the deposition testimony of its vocational expert which it would have presented at the hearing but for the parties' misunderstanding regarding the stipulation. In addition, I agree with the Employer that had Ms. McQuade-Johnson been called to testify at the hearing, she would have had the opportunity, after being apprised of the Claimant's testimony regarding his illiteracy, to call the employers listed in her original labor market survey regarding their willingness to hire an illiterate person and to testify about the results of her inquiries. Therefore, the Claimant's objection to such testimony at the deposition is overruled.

On the other hand, the Claimant's objection to the Employer's attempt to introduce the January 28, 1999 supplemental labor market survey is well-founded as there is simply no excuse for the Employer's failure to obtain this evidence prior to the hearing. The record shows that the Employer's vocational rehabilitation consultant met with the Claimant as early as February 1993, EX 12 at 1, and the original labor market survey was prepared in April 1993. EX 13. The case did not proceed to hearing until August 1998, a period of five years which is more than ample time for preparing a supplemental survey with the exercise of even minimal diligence. Moreover, unlike the situation in *Delay*, the Claimant here did absolutely nothing to preclude the Employer from developing complete and up-to-date vocational evidence for timely submission at the hearing. Under these circumstances, I find that the Employer's offer of the supplemental survey, which is based in part on Ms. McQuade-Johnson's "review of testimony of Mr. David Hinton secured at the August 11, 1998 formal hearing", Defendant's Deposition Exhibit 6 at 1, clearly amounts to an impermissible post-hearing attempt to correct perceived errors in the Employer's litigation strategy by utilizing the section 22 modification proceeding as a back door for relitigating an issue which could have been raised at the hearing. Accordingly, the Claimant's objection to this evidence is sustained, and the supplemental labor market survey will not be considered.

With regard to the evidence introduced by the Claimant at the McQuade-Johnson deposition, the Employer's objection to Claimant's Deposition Exhibits 4 and 5, the documents from unrelated compensation cases which counsel to the Claimant used in an attempt to attack Ms. McQuade-Johnson's credibility, is sustained on the basis of relevancy. Since I have sustained the Claimant's objection to the Employer's supplemental labor market survey, I also sustain the Employer's objection to CMX 1, the rebuttal vocational rehabilitation reports from William J. Kramberg. The Claimant could have offered his own vocational evidence at the hearing but elected not to do so, and the only excuse for admitting this late submitted evidence would be as rebuttal to the Employer's late-submitted supplemental survey. Having thus rejected the Claimant's rebuttal vocational evidence, I grant the Claimant's motion to strike the Employer's sur-rebuttal evidence — EMX 1-7 and EMX 10-12, the documents purportedly written and/or

signed by the Claimant. In view of these rulings, the Employer's request for leave to conduct additional vocational testing of the Claimant and to depose Mr. Kramberg is denied as moot.

The remainder of the post-hearing evidence relates to the Employer's request for special fund relief pursuant to section 8(f) of the Act. Section 8(f) of the Act shifts part of the liability for permanent partial and permanent total disability, and for death benefits, from the employer to a special fund established pursuant to 33 U.S.C. §944, in cases where a work-related injury combines with a pre-existing partial disability to result in greater permanent disability than would have been caused by the injury alone. 33 U.S.C. §908; *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991); *General Dynamics Corp. v. Sacchetti*, 681 F.2d 37, 39-40 (1st Cir.1982). In *Eggar v. Willamette Iron and Steel Co.*, 9 BRBS 897, 899 (1979), the Board held that an employer must raise and litigate the applicability of section 8(f) at the time of the initial hearing on permanent disability. Under this ruling, post-hearing requests for section 8(f) relief are generally denied as untimely where the employer could have requested such relief at the time of the initial hearing but failed to do so, absent compelling circumstances. *American Bridge Division, U.S. Steel Corp. v. Director, OWCP*, 679 F.2d 81, 82-83 (5th Cir. 1982); *Adams v. Brady-Hamilton Stevedore Co.*, 16 BRBS 350, 351 (1984). The Employer appears to argue that the parties' misunderstanding over their stipulation at the hearing constitutes a compelling circumstance that would excuse its failure to raise section 8(f) until after the hearing:

> Employer's counsel had thought the parties agreed that there was residual earning capacity based on stipulations, and this may have affected Employer's prior counsel's decision concerning section 8(f) relief (a partial disability is less disability). If the claim is held to be a total claim, it is only fair to allow not only the section 22 evidence, but a request for section 8(f) relief. See e.g. Falcone v. General Dynamics Corp., 16 B.R.B.S. 202 (1984); Ferrell v. Jacksonville Shipyards, Inc., 12 B.R.B.S. 566 (1980).

Employer's Brief in Support of Modification at 8. This argument does not withstand scrutiny. While counsel to the Employer at the hearing may have been confused as to what the parties had stipulated to regarding the question of the Claimant's residual earning capacity, a review of the pertinent case law, including the cases cited by the Employer, reveals that compelling circumstances have been recognized in three types of situations, none of which are applicable herein.

The first type of situation to present compelling circumstances is where the ALJ fails to correct an obvious misunderstanding by an employer at the hearing regarding the applicability of section 8(f). *See, e.g., Tibbets v. Bath Iron Works Corp*., 10 BRBS 245, 252 (1979) (remand for consideration of section 8(f) relief appropriate to prevent an unwitting waiver of an important right where the employer stated to the ALJ that it believed that section 8(f) only applied in cases of permanent total disability and not to permanent partial disability and where the ALJ failed to correct this obvious mistake). A second type of compelling situation arises where section 8(f) was not applicable at the initial hearing because permanency was not at issue. *See e.g., Ferrell v. Jacksonville Shipyards, Inc*., 12 BRBS 566, 571 (1980) (remand to ALJ with instructions to

permit the employer to raise section 8(f) where ALJ awarded permanent total disability benefits despite parties' agreement that the sole issue before the ALJ was the extent of the claimant's *temporary* disability). The third situation is where modification of a prior compensation award is sought based on an alleged change in conditions. *See e.g. Falcone v. General Dynamics Corp.*, 16 BRBS 202, 203-204 (1984) where the employer requested section 8(f) relief when it moved to modify a prior award of temporary total disability benefits on grounds that the claimant's disability had subsequently become permanent. *See also Director, OWCP v. Edward Minte Co.*, 803 F.2d 731, 735-36 (D.C. Cir. 1986) (where the claimant moved to modify a prior compensation award of permanent partial disability to an award of permanent total disability, employer properly raised section 8(f) in view of the alleged change in the level of the claimant's disability).[16]

In this case, there has been no such showing of compelling circumstances. There was no indication at the hearing that counsel to the Employer was impaired by an erroneous belief as to the applicability of section 8(f). There was no agreement in this case that permanent disability was not at issue at the hearing. Rather, the record clearly shows that the Claimant sought a finding of permanent total or, in the alternative, permanent partial disability. TR 17 (Claimant's opening statement). And, there is no allegation or evidence that there has been a change in the Claimant's condition since the August 1998 hearing which would justify the Employer's post-hearing request for section 8(f) relief. On these facts, I am constrained to find that the Employer's request for section 8(f) relief is untimely. Accordingly, the Employer's post-hearing evidence in support of this request (Defendant's Deposition Exhibits 1 and 2; EMX 8, 9, 13, 14) is not admitted.

IV. Findings of Fact and Conclusions of Law on Modification

The Employer asserts that two of the jobs in the original labor market survey are within the Claimant's physical restrictions, as identified by Dr. Gold, and are entry-level positions for which the employers explicitly stated that they would hire an illiterate person. According to the Employer, the original labor market survey establishes a residual earning capacity of at least $200.00 per week which was not rebutted by the Claimant who presented no evidence that he looked for work. Employer's Brief in Support of Modification at 8.

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[16] It is noted that *Edward Minte* appears to conflict with *American Bridge Division, U.S. Steel Corp. v. Director, OWCP*, 679 F.2d 81, 82-83 (5th Cir. 1982) and *Adams v. Brady-Hamilton Stevedore Co.*, 16 BRBS 350, 351 (1984) in that it permitted an employer to raise section 8(f) after the initial hearing where permanency, albeit partial not total, was in issue. However, the Court declined to consider the issue of whether the employer had waived its rights under section 8(f) by not invoking special fund relief at the initial hearing because the issue of waiver was untimely raised by the Director for the first time on appeal. *Id* at 237. In any event, *Edward Minte* is distinguishable from the instant case because the Claimant has not sought to modify the prior award to obtain a higher level of benefits.

I agree with the Employer that the record, as now supplemented by the post-hearing deposition testimony of Ms. McQuade-Johnson, does show that there are jobs available within the Claimant's physical restrictions for which an illiterate person would receive consideration by the employers. However, I do not agree that the record supports a finding that the Employer has demonstrated the existence of suitable alternative employment. The problem once again lies in what McQuade-Johnson did not ask the employers of the cashier positions in question. Although she testified that she had inquired about the employers' willingness to consider an illiterate person for these positions, she admitted that she had not explored with these employers whether they would hire an illiterate person who also has minimal or no ability to add or subtract. I recognize that Ms. McQuade-Johnson testified that office automation has reduced the level of mathematical skill required to work in many cashier positions. However, she did acknowledge that an ability to perform basic addition and subtraction certainly is "helpful", and nowhere in her reports or testimony does she claim that an illiterate individual with the additional handicap of inability to perform simple math would be hired as a cashier. Given this question alone, I would have considerable difficulty in finding that the Employer had met its burden of establishing the existence of suitable alternative employment. There is, however, another equally serious defect in the Employer's evidence. That is, there is no evidence that Ms. McQuade discussed with the employers the fact that the Claimant is 70 years old and has spent his entire working life in very heavy, unskilled manual labor. As the Fifth Circuit stated in *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1041 (1981), an employer must make "some showing of work available to a claimant which is within that claimant's physical and educational ability, age, experience, etc. to perform and secure." This record does not show that any of the jobs in the original labor market survey, including the two cashier positions which Ms. McQuade-Johnson identified as open to illiterate applicants, are available to the Claimant considering his age and experience in conjunction with his other vocational factors. I can not conclude that this void is insignificant in view of the fact that the Social Security Administration's Medical-Vocational Guidelines consider an individual with a limited education[17] and an unskilled work history to be totally disabled at age 55 if they can no longer perform their usual job and are physically restricted to light work and at age 50 if they are restricted to sedentary work. *See* 20 C.F.R. Part 404, Subpart P, Appendix 2, Table 2, Rule 202.1 and Table 1, Rule 201.09. Although the legal definition of disability under the Social Security Act is not the same as the concept of disability under the Longshore and Harborworkers' Compensation Act, the Medical-Vocational Guidelines underscore the economic reality that the adverse vocational factors of age, limited education and lack of transferable skills combine to drastically reduce a disabled individual's chances of securing alternative employment. Given the obvious problems that the Claimant would face in re-entering the workforce in an entirely foreign retail or service environment, I don't think it is unreasonable to require the

[17] A limited education for Social Security disability purposes is defined as "ability in reasoning, arithmetic and language skills, but not enough to allow a person with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs." 20 C.F.R. §404.1564(b)(3). Generally, attainment of an educational level between the seventh and eleventh grades is considered a limited education. The Claimant only attended school through the third grade.

Employer to affirmatively demonstrate that there is a job in existence for which he could be hired if he applied, considering *all* of his relevant vocational factors. The Employer has not done this, and I consequently find that there was no mistake in my prior determination of fact that it has not met its burden of establishing the existence of suitable alternative employment.

IV. Conclusion

Having determined that the Employer's request for section 8(f) relief is untimely and that it has not demonstrated that there was any mistake in any of my prior determinations of fact or that there has been any change in conditions, I conclude that modification pursuant section 22 of the Act is not warranted.

V. Order

It is therefore **ORDERED** that:

(1) The Employer's motion for modification of my December 17, 1998 decision and order awarding benefits is **denied**; and

(2) The Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to counsel for the Employer/Carrier and the Director who shall then have fourteen (14) days to comment thereon.[18]

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DANIEL F. SUTTON
Administrative Law Judge

Camden, New Jersey

[18] Even though the Claimant has not been awarded any additional compensation as a result of this proceeding, his Counsel's successful defense of the Employer's modification request and preservation of the Claimant's current level of compensation creates an entitlement to fees. *See generally, McDougall v. E. P. Paup Co.*, 21 BRBS 204, 212 (1988).